Modipalm Engineering Sdn Bhd & Anor v Allianz General Insurance Co (M) Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–194–01 OF 2012
APANDI ALI, ABDUL AZIZ ABDUL RAHIM AND DAVID WONG JJCA
22 DECEMBER 2013

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Insurance — Marine insurance — Damage to goods — Cargoes falling overboard during shipment — Insurer rejecting claim on grounds of overloading causing unseaworthiness of vessel — Failure to prove that appellant privy to overloading or unseaworthiness — Whether express waiver of unseaworthiness in policy applicable — Whether insurer deemed to have waived unseaworthiness condition — Whether insurer liable to pay under policy

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Insurance — Marine insurance — Damage to goods — Proof of damage — Value marine policy — Whether proof of loss required

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The first appellant was the manufacturer of certain cargoes and had sold them to the second appellant. The cargoes were shipped to Bintulu Port in Sarawak by way of a barge. The shipment experienced rough seas resulting in some of the cargoes falling overboard. The appellants had insured the cargoes with the respondent and thus made a claim against the respondent for the lost cargoes. The claim was rejected by the respondent on the ground that there had been overloading of cargoes the barge causing the unseaworthiness of the vessel. The trial judge found that the respondent had proved a breach of warranty by the appellants in respect of the overloading of the vessel and hence dismissed the appellants' claim. The appellants appealed against this dismissal.

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Held, allowing the appeal with costs:

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(1) Clause 5 of the policy was an express waiver of unseaworthiness of the vessel and such waiver will be taken away only if there was proof that the appellants as insured and/or their agents were privy to the unseaworthiness. Privy in plain language implies knowledge of such unworthiness which in this case related to the overloading of cargoes on the barge. There was evidence from the respondent's own adjuster that there was no such knowledge. Had the learned judge given proper consideration to cl 5, she would have concluded that the unseaworthiness condition was waived and the respondent was liable under the policy (see paras 13 & 15–16).

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(2) The policy was one 'value marine policy'. The value to be insured was the value agreed between the insurer and the insured and it was the conclusive value of subject matter which in this case was the cargoes. In a claim in a value policy, no proof of loss is required unless there is evidence that there has been a fraudulent overvaluation of the subject matter, which there was none here. In any event, the appellants had on a balance of probabilities proved their loss (see paras 17–20).

[Bahasa Malaysia summary

Perayu pertama adalah pengilang kargo tertentu dan telah menjualnya kepada perayu kedua. Kargo-kargo telah dihantar ke Pelabuhan Bintulu di Sarawak melalui baj. Penghantaran telah mengharungi laut bergelora mengakibatkan sebahagian daripada kargo-kargo jatuh ke dalam laut. Perayu-perayu telah menginsuranskan kargo-kargo dengan responden dan oleh itu membuat tuntutan terhadap responden untuk kerugian kargo-kargo tersebut. Tuntutan tersebut ditolak oleh responden atas alasan bahawa terdapat muatan kargo-kargo yang sarat atas baj menyebabkan kapal ketaklayakan belayar. Hakim perbicaraan mendapati bahawa responden telah membuktikan perlanggaran waranti oleh perayu-perayu berkaitan kesaratan kapal dan oleh sebab itu menolak tuntutan perayu-perayu. Perayu-perayu merayu terhadap penolakan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Klausa 5 polisi adalah pengecualian yang nyata terhadap ketaklayakan kapal belayar dan pengecualian sedemikian akan digunakan hanya jika terdapat bukti bahawa perayu-perayu sebagai pengambil insurans dan/atau ejen-ejen mereka adalah privi kepada ketaklayakan belayar. Privi dalam bahasa mudah melibatkan pengetahuan mengenai ketaklayakan sedemikian yang mana di dalam kes ini berkaitan kepada kesaratan kargo-kargo di atas baj. Terdapat keterangan daripada adjuster responden sendiri bahawa tiada pengetahuan sedemikian. Sekiranya hakim perbicaraan memberikan pertimbangan yang betul kepada klausa 5, beliau mungkin akan memutuskan bahawa keadaan ketaklayakan belayar dikecualikan dan responden bertanggungan di bawah polisi (lihat perenggan 13 & 15–16).

(2) Polisi adalah satu 'value marine policy'. Nilai yang dinsuranskan adalah nilai yang dipersetujui di antara syarikat insurans dan pengambil insurans dan ia adalah nilai konklusif perkara yang mana dalam kes ini adalah kargo-kargo. Dalam tuntutan berkenaan nilai polisi, bukti kerugian tidak diperlukan melainkan terdapat keterangan bahawa terdapat penipuan penilaian berlebihan terhadap perkara tersebut, yang mana tidak terdapat di dalam kes ini. Walau bagaimanapun, perayu-perayu di atas imbangan kebarangkalian telah membuktikan kerugian mereka (lihat perenggan 17–20).]

Notes

For cases on damage to goods, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 254–255.

Appeal from: OS Suit No 22–38 of 2008–1 (High Court, Kuching)

Albert Tan Yew Liong (Gordon Tan with him) (Tang Legal Practice) for the appellant.
Cecil Ha (Ibrahim & Co) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court in which the learned judge held that the respondent/defendant was not liable for a claim made by the appellants/plaintiffs pursuant to a marine cargo insurance policy ('the policy') in respect of loss of 289 packages of oil palm machineries with accessories ('the cargoes').

[2] We heard the appeal and after giving due considerations to respective submissions from both counsel, we allowed the appeal and now give our reasons for our decision.

BACKGROUND FACTS

[3] The first appellant is the manufacturer of the cargoes and had sold them to the second appellant which is a subsidiary of the first appellant. The cargoes were shipped to Bintulu in Sarawak by way of a barge, 'Bina II' which was towed by a tugboat 'Bina I'.

[4] On its way to Bintulu Port, the shipment experienced rough seas resulting with some of the cargoes falling overboard. The appellants had insured the cargoes for a sum of RM7,092,363.20. However the joint claim of the appellants was only for the sum of RM5,933,762.70 for those lost cargoes.

[5] The claim was rejected by the respondent on the ground that there has been overloading of cargoes on 'Bina II', rendering the unseaworthiness of the

vessel.

HIGH COURT DECISION

[6] The learned judge dealt with two issues in resolving this dispute. The first issue relates to whether the appellants had a cause of action against the defendant with the second issue relating to whether the loss is covered by the policy taken out by the appellants.

[7] On the first issue the respondent's counsel had raised the contention that the second appellant had no locus standi to sue the respondent as it was the first appellant which is named in the marine cargo certificate of insurance. The learned judge made short shrift of the contention and found that as the second appellant is the purchaser of the cargoes and named as consignee of the cargoes, it had an interest in the policy and had every right to sue the respondent. It is a non-issue, since there is no cross-appeal made on this finding by the respondent.

[8] As for the second issue the learned judge found that the respondent had proved that there had been a breach of warranty by the appellants in respect of the overloading factor of the vessel. In view of this breach, the learned judge held that the pre-condition of the respondent's liability had not been fulfilled and on that basis dismissed the claim by the appellants.

OUR GROUNDS OF DECISION

Liability

[9] Learned counsel for the appellants premised this appeal on the contention that the learned judge had erred in not taking into account cl 5 of the policy which reads as follows:

> 5. Unseaworthiness and Unfitness Exclusion Clause
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> 5.1 In no case shall this insurance cover loss damage or expense arising from unseaworthiness of vessel or craft, unfitness of vessel craft conveyance container or lift van for the safe carriage of the subject matter insured, where the assures or their servants are *privy to such unseaworthiness or unfitness*, at the time the subject matter insured is located therein.
>
> 5.2 The underwriters waive any breach of the implied warranties of unseaworthiness of the ship and fitness of the ship to carry the subject matter insured to destination, unless the Assured or their servants are *privy to such unseaworthiness or unfitness*.

[10] Learned counsel for the appellants had submitted that even if the

unseaworthiness is proved by the respondent, cl 5 would assist the appellants in that if there is no proof that the appellants or their agents were *privy to such unseaworthiness or unfitness*, the respondent is not entitled to rely on the unseaworthiness of the vessel to deny liability.

[11] The complaint of the learned counsel for the appellants is simply that the learned judge did not give proper regard to the effect of cl 5 namely the key word 'privy' therein. On this aspect this is what the learned judge said:

> He had earlier in his submission also referred to the clause 5.2 of the Institute Classification Clause (A) which provides on waiver of breach of 'the implied warranties of seaworthiness of the ship to carry the subject matter insured unless the assured or their servants are privy to such unseaworthiness or unfitness'. He also submitted that the said exception in the clause on unseaworthiness of the ship is contradictory to the express warranty of 'warranted no overloading' and therefore the contra proferentum rule applies. I would agree that overloading of the barge would render it unseaworthy under section 39(1) and 40(2) of the Marine Insurance Act 1906 as stated by Allianz itself in their repudiation letter dated 11.04.2008 (Ex P24) at page 126 of the Plaintiff's Bundle of Documents, but I would not agree that it is contradictory to the exception in the clause because overloading is just one of the factors which made a vessel unseaworthy; its overall physical condition being one other factor that I can think of which also render it so.

[12] We have read this paragraph in the context of the whole judgment with care and with respect, we find that the learned judge appeared to miss the point being raised by learned counsel for the appellants. The learned judge with due respect only paid a cursory attention to it.

[13] In our view, cl 5 is of immense significance in the context of this case as unseaworthiness of the vessel is the ground in which the respondent had repudiated its liability. Clause 5 is an express waiver of unseaworthiness of the vessel and such waiver will be taken away only if there is proof that the appellants as insured and/or their agents are privy to the unseaworthiness. Privy in plain language implies knowledge of such unworthiness which in this case relates to the overloading of cargoes on the barge.

[14] As pointed out earlier, the learned judge did not address her mind on the significance of cl 5. Hence the result of which is simply that the learned judge failed to address the issue whether there is proof by the respondent that the appellants were privy of the overloading of the vessel.

[15] To add salt to injury, there is evidence from the respondent's own adjuster that there was no such knowledge and this is set out in the report of McLarens Young International which states as follows:

A We wish to advise that the Insured or their servants were not privy to the unseaworthiness or unfitness of the Tug Boat and the Barge at the time the subject matter was loaded on biard the barge due to the following obtained:

> The Tug Boat and The barge was arranged by the appointed Freight Forwarder, CNC Freight Services Sdn Bhd

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> Reportedly, upon receipt of the particulars of the Tug Boat and the Barge, the Insured had accordingly sent the details to the insurer - refer to Appendix K.

> The consignment was monitored and controlled by the Freight Forwarder, CNC Freight Services Sdn Bhd, ex Moodipalm (Insured's premises) until delivery to the final destination at the site, POM.

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> The Insured as per compliance by the Policy had engaged ITS Testing Services (M) Sdn Bhd to conduct the lashing and towing survey. ITS Testing Services (M) Sdn Bhd had certified that the lashing was in order.

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> Reportedly the Insured is not aware of the overloading of the Barge Bina II and entire operation of shipment from the Insured's premises to Bintulu Port.

E **[16]** With such adverse evidence against the respondent and if the learned judge had given proper consideration to cl 5, she would have no doubt in our mind concluded that the unseaworthiness condition is waived and the respondent is liable under the policy.

F *Quantum*

[17] This brings us to the quantum of loss to be awarded. It is undisputed that the policy is one 'value marine policy'. The learned judge on this issue states as follows:

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> Again I would have to agree with Allianz on this issue. In my view, it is not sufficient for Modipalm to tabulate their 'claimable amoun' without further proof of the amount so claimed, to show that the machineries which they claimed which were lost at sea were actually worth as much as what Lim Chye Ooi have tabulated. Their burden of proving the loss claimed on a balance of probability is not discharged by a simple tabulation of the same, or by the fact that Mr Lim Chye Ooi knew the value of the loss and was not challenged and his evidence (as submitted by Mr Albert Tang), nor also by the evidence of Mr Lim Chye Ooi that the loss adjusters, McLarens Young did not dispute the amunt which they claimed. Mr Albert Tang in his submission in reply tried to persuade me that the sum claimed is mathematically correct because RM6,231,766 represents roughly 87.87% of the amount insured of RM7,092,362 and the percentage of cargo lost is roughly 87.54% ie 253 packages out of 289 packages. With respect, this deduction is abased entirely on the assumption that all packages on board are of equal value and as evidenced from the tabulation of Mr Lim Chye Ooi himself, this is simply the case.

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[18] With respect to the learned judge, she had failed to first determine what does a 'value policy' entail? It is as pointed out by learned counsel for the appellants that the value to be insured is the value agreed between the insurer and the insured and it is the conclusive value of subject matter which in this case is the cargoes. If the learned judge had considered this, she would have not have been required to worry as to whether the appellants had discharged the burden of proof in respect of the loss incurred by the appellants. In a claim in a value policy, no such proof is required unless of course there is evidence that there has been a fraudulent overvaluation of the subject matter, which there is none here.

[19] In any event, we are of the view that the appellants through the evidence of PW3 had discharged the burden of proving their loss and this clear in this part of the evidence:

> Q10 What is the claim against the Defendant in this case and could you elaborate?
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> A: The Plaintiff's claim is summarized in my calculation appearing at pages 120-121 Bundle B. the summary is the list of missing items amounting to RM6,231,766.00. On top of this moment, is a sum of RM14,300.00 being the cost of repair for the damage items. The gross sum is RM6,246,066.00. Per the Marine Cargo Certificate of Insurance (Exh6 P5, p 22 of bundle B), an Excess of 5% of the loss amount or a minimum of RM5,000 whichever is higher, would be deducted from our claim. Therefore, deducting the 5% Excess, which is RM312,303.30 against the loss amount, the net sum claimable against the Defendant in this case is RM5,922,762.70
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> Q11 Please look at pages 94 to 106 of Bundle C, the loss Defendant's loss adjusters' McLarens Your International's list of missing items. What is the relationship between these missing items with your summary at pages 120-121 Bundle B?
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> A: The summary at pages 120-121 of Bundle B provides the monetary value of the missing items listed at pages 94-106 of Bundle C
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> …
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> Q18 Did the Defendant's loss adjusters, McLarens Young dispute the amount of Plaintiff's loss and damage?
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> A: No
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> 41. During cross-examination, PW3 said:
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> Q Refer to Exhibit P23 (pages 120-121 Bundle B). Do you agree that the accounts states in these 2 pages are only estimates of costs for ear item?
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> A: I disagree. I am in charge of costing and I know the value of each items!
>
> Q Who prepare this list at pages 121 and 122?
>
> A: I prepared it.

[20] This is the evidence of someone 'in the know' so to speak and in our view his evidence is the best evidence available. There is no contradictory evidence from the respondent and as such we are comfortable to conclude that the appellants had on a balance of probabilities proved their loss.

[21] Accordingly we find that the appellants had proved their loss.

CONCLUSION

[22] For reasons stated above, we allowed the appeal and set aside the judgment of the High Court. We also entered judgment for the appellants for the sum of RM5,933,762.70 with interests at the rate of 8%pa from the date of loss until full payment of the same. Costs in the sum of RM60,000 for here and below is awarded to the appellants and we ordered that the deposit to be refunded.

Appeal allowed with costs.

Reported by Kanesh Sundrum